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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	]	
	]	
Federal-State Joint Board	]	
On Universal Service	]	
	]	
To: Administrator,	]	SLC Applicant I.D. No. 145698
Schools and Libraries Corporation	]	
	]	
To: The Commission	]	CC Docket No. 96-45

CONSOLIDATED RESPONSE

Submitted by:

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OF EDUCATION

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July 21, 1998

SUMMARY
OF
CONSOLIDATED RESPONSE

ISIS 2000, an unsuccessful bidder for a contract competitively-awarded by the State to another bidder to provide Internet services to the State's K-12 schools, after having unsuccessfully exhausted the State's contract review and appeal processes, now effectively requests the Commission to review the State's contract award de novo, on the grounds that components of the award raised issues of Universal Service Fund ("USF") eligibility for the State's schools. The ISIS 2000 request, contained in six unauthorized supplemental pleadings, is based on the premise that, despite contrary findings by the State of Tennessee after exhaustive reviews at all levels (including nine hours of hearings), the ISIS 2000 bid was the "lowest price" bid and, therefore, was required to be accepted. The State found that the ISIS 2000 bid not only was the highest price for the requested service, but also was confusing and effectively non-responsive. In addition, the State found that the ISIS 2000 proposal was for a technically and operationally inferior and deficient service. The basis for these findings are clear from the records of the associated State proceedings, submitted by the State in this matter. An artificially low "buy-in" bid, which relies on future change-orders, omissions, lack of clarity, errors and hidden service expansions, is not a low pre-discount bid but rather is an acceptably high bid which cannot be entertained under either State or federal law. In rejecting the ISIS 2000 bid, the State gave its "primary consideration to price" and awarded the Contract to ENA, with the "lowest pre-discount price" for a responsive service, all in full accordance with State law.

Next, ISIS 2000 asks the Commission to find that the type of Internet service now commonly utilized by businesses to achieve enormous price economies, can not be made available to Tennessee schools, or any schools for that matter, for USF funding. Rather, schools, according to ISIS 2000, should be limited to purchasing managed hardware and software and then to using it with a simple "dial-up ISP", such as AOL.com. The ISIS 2000 approach was found most expensive and least efficient by the State, and again was rejected after full review on protest by ISIS 2000, which protest included the State's Commissioner of Finance Commissioner of General Services and Administration and Controller of the Treasury. Moreover, in the case of Tennessee, the State found that the rural nature of the State's schools made a newly-offered dedicated, guaranteed Internet service the only option which could actually meet the School's unique needs and ensure the availability of the service being acquired. The Commission's Rules, State law and Congressional policy clearly envision--indeed require--that the efficiencies and economies offered by the winning bidder be adopted by the State in this case, particularly at the low cost of less than $17 per student, excluding any internal connections as required by State procurement procedures.

Finally, ISIS 2000 argues that the revenue from the sale of the State's prior network, ConnecTen, should not be "counted as a State contribution" for Universal Service Funding purposes. The facts show that the State has appropriated 12.5 million for FY 98-99 from its General Fund. The sale, just like the sale of a State office building, was accomplished under State law, and the State has the constitutional right to sell and to utilize these fungible revenues in any fashion it desires, including for its schools. Indeed, the USF is designed to encourage competitive bidding and State and local funding, not to discourage it and prevent it, as ISIS 2000 requests. The suggestion that the State must keep and upgrade its "piecemeal" network in order to obtain funding has no support in State or federal law, particularly when it would be more expensive, less efficient and would not meet the Schools legitimate and reasonable needs. The further suggestion that the sale of the network and the purchase of Internet services results in "corporate-waste" has been reviewed at length and found groundless by the State Comptroller of the Treasury, the State's Chief Information Officer and the State's Information Services Council. The facts, law and policy supporting the State's decision have been submitted in this Matter and are beyond question.

The matters raised by ISIS 2000 are self-serving, general, speculative accusations without factual basis, in law or policy. Furthermore, they are entirely within the scope of State actions and (have been resolved by the State), therefore, they should not be brought before the Commission. The Commission cannot, and need not, be a further de novo review board for State procurement decisions. Further, the Commission should not, and need not, so narrowly interpret its rules as to preclude the actual benefits they were designed to achieve and thereby, to encourage inefficient and ineffective basic services by knowing-contractors. For these reasons (as well as those set forth in the State's original Opposition), the ISIS 2000 Objection should be denied.

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CONSOLIDATED RESPONSE

The State of Tennessee ("Tennessee"), acting by and through its Department of Education ("Department"), herein respectfully submits, pursuant to Part 1 of the Rules and Regulations of the U.S. Federal Communications Commission ("Commission") ("Rules"), its consolidated response ("Consolidated Response") to the various new matters raised by Integrated Systems and Internet Solutions, Inc. ("ISIS 2000") in a series of six (6) unauthorized and supplemental pleadings in the above-captioned matter.[1]

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[1] Since its Reply ("ISIS 2000 Reply") was filed on April 20, 1998, ISIS 2000 has filed the following seven (7) pleadings: Supplement to Objection to Application and Request for Expedited Declaratory Ruling, dated April 27, 1998; Supplement to Reply, dated May 1, 1998; Letter and Report on Ex Parte Meetings, dated May 14, 1998; Letter and Request to reject initial funding to Debra Kriete, General Counsel, Schools & Libraries Corporation ("SLC"), dated June 3, 1998; Letter and Request to expand SLC audit to James B. Henchman, Comptroller General, General Accounting Office ("GAO"), dated June 5, 1998; Second Supplement to Objection to Application, dated June 12, 1998 and Third Supplement, dated July 15, 1998 (referred to herein collectively as the "ISIS 2000 Supplements" and individually as "Supplements 1-7"). The Department has just received Supplement No. 7 and, therefore, will address it separately.

The Department has responded separately to the ISIS 2000 letters to the SLC General Counsel and to the GAO Comptroller General (Supps 4 and 5, above), and copies of

I.

INTRODUCTION

In its original Objection to Application, filed in the above-captioned matter on April 3, 1998 ("ISIS 2000 Petition"), ISIS 2000, a disgruntled and unsuccessful bidder seeking to overturn and reopen a State contract for the provision of Internet Access Services to the State's K-12 schools, has requested the Commission to determinate as ineligible for Universal Service Fund ("USF") support four (4) specific elements of the State's 1998 Internet Access Service Program for Tennessee Schools ("Program"). This Program was submitted to the SLC by the Department for such support on April 15, 1998.[2] In its original Opposition to the ISIS 2000 Petition ("Department Opposition"), the Department demonstrated conclusively that the ISIS 2000 Petition must be dismissed as to each of the four (4) elements. In this regard,

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these Department responses have been filed in the above-captioned matter. In these responses, the Department has strenuously objected to these two attempts by ISIS 2000 to effectively delay consideration of the State's Application for school funding until Universal Service Fund ("USF") funds are no longer available for the State's K-12 schools. The Department has asked that the two letters be summarily rejected. ISIS 2000 also has provided its Supplements (and interviews) to the press and has included selected press clippings into the record in order to influence the decision-making process (see Supp. 2 and Comments of Jeffrey Hustad and Teri Spencer). The State prefers to allow the Commission to consider this matter on its merits, and will not respond to the selected clippings.

Finally, the Department, in the interest of an expedited Commission decision, will not formally object to the inclusion in the record of the ISIS 2000 Supplements; however, it herein respectfully and officially moves for the opportunity to respond to the new matters raised therein (hereinafter the "State's Motion").

[2] It should be noted that ISIS 2000, as a part of its strategy, filed its Petition with the Commission before the State filed its Application, thus acting effectively to deny the State access to the SLC decision makers at this critical stage, access available to all other Applicants before filing. (See State Application at "Note to Item 17").

the Department demonstrated that the ISIS 2000 arguments were: (1) factually incorrect, (2) legally unsupportable and (3) contrary to existing Commission policy, as well as contrary to the public interest and in violation of State regulations.

In its Supplements, ISIS 2000 moves away from questioning the four (4) specific funding elements, which are properly within the Commission's scope for consideration, to challenging the State's motives, the State's procurement practices and the State's internal business decisions. In this regard, ISIS 2000 submits that, because of certain official State actions, the Commission's USF Rules and policies should not, in fact, be implemented in the case of Tennessee (ISIS 2000 Supp. 3 at page 2). The State's public interest motives, its internal business decisions, and its long-standing and are respected competitive procurement practices are statutory, well-documented and beyond question; but, just as important, these ISIS 2000 accusations are irrelevant to the relief requested and misdirected to the Commission. They do not go to the Commission's consideration of USF eligibility in the current situation. Rather, they go to issues properly brought before State decision-makers and appeal bodies. Thus, they should be dismissed. Because ISIS 2000 has taken its State advocacy to this extraordinary level, however, the Department feels compelled to respond, and herein responds, in order to insure that ISIS 2000, in its own self-interest, cannot irreparably harm the State's K-12 schools and irresponsibly prejudice the proper and orderly implementation of Congressional, State and Commission policies and rules supporting education.

Finally, in its original Opposition (Opposition, Section VII), the State asked the Commission, in granting its Application, to give formal recognition to the needs of Schools to transition efficiently and effectively to the commercial Internet Access Service environment advanced by the USF legislation and envisioned by the Commission's implementing USF Rules. In this Consolidated Response, the State expands on its original request to ask that the Commission, in its grant, also recognize that the Commission's legitimate review of funding eligibility is not (and cannot be) a stage for a de nova federal review of State contracts and State decisions by disgruntled bidders, particularly when they have already exhausted extensive State administrative review procedures to the highest State level on all issues. The ultimate objective of the USF program must be to insure maximum permissible funding to our children, not to create an additional level of bureaucratic appeal for our schools to endure and finance.

II.

THE TENNESSEE SCHOOLS' CONTRACT WAS BASED ON THE "LOWEST PRE-DISCOUNT PRICE", AND THE "MOST COST-EFFECTIVE" SERVICE, IN FULL COMPLIANCE WITH BOTH STATE AND FCC RULES. THUS, IT IS ELIGIBLE FOR FUNDING ON THIS BASIS.

ISIS 2000 continues to assert that its bid was for "substantially the same services" as offered to the State by Education Networks of America, Inc. ("ENA"), the winning bidder. Thus, it argues that the ISIS 2000 bid is the proper "benchmark" on which to deny the ENA contract. (ISIS 2000 Reply at Section VI). This is simply incorrect, as to fact, law and policy.

As set forth in the Department Opposition (Opposition at page 7 and Attachment C), as well as in the ENA Opposition to Reply (ENA Opposition at page 3), the State has found that the ISIS 2000 bid was for a "substantially different" and "technically and operationally inferior" service. This is clear from the factual record before the State and in this Matter (see State Opposition, Attachment A).[3] The State rendered this factual and legal decision only after an indepth review of the specific technical needs and operation of its K-12 schools, and only after an indepth analysis under its rules of the various proposals received (see State Evaluation at Opposition, Attachment C, page 3). (See also May Order, FCC 97-157 at para 481). The decision to award a contract to ENA was unanimous among the four (4) independent reviewers of the ISIS 2000 proposal; this decision was unanimously supported after an independent review by the Department of Education; this decision was unanimously upheld on protest by ISIS 2000 to the State Review Committee (chaired by the State Commissioner of Finance and Administration consisting of representatives of the State Comptroller of the Treasury and the Commissioner of General Services); and this decision was unanimously supported by the State's independent Information Systems Council ("State ISC") (Chaired by the Commissioner of Finance and Administration and consisting of representatives from the independent Tennessee Regulatory Authority ("TRA"), from the Senate and House and from the Comptroller's Office). In brief, the State has clearly justified

[3] It is important to recognize that, while continuing to argue this point in general sweeping terms, ISIS 2000 does not address the myriad of material differences in the proposals, as factually set forth by the State and its independent evaluators. See also footnotes 4, 6 and 7 below.

It is also important to recognize that the study by ISIS 2000's "independent" consultant (hereinafter "Rampart Report") (See ISIS Opposition, Attachment Q) addresses differences only on a hypothetical basis, not on a factual basis ("we have relied on and assumed the accuracy and completeness of the financial and other information...[provided to us by ISIS 2000]...we have not performed an "independent appraisal". Finally, while ISIS 2000 relied on the telecommunication expertise of its parent companies (Great Universal and Millicom) in its proposal, neither party participated in the Stapleton Report or was to be a participant in the ISIS Service.

its selection of ENA as meeting its needs "most effectively and efficiently", and in full compliance with its procurement regulations. (See Attachment C to State Opposition). Moreover, since the State also determined that ISIS 2000 did not provide the material information and clarity required by the RFP, including a proposal for non-USF funding, ISIS 2000 was effectively non-responsive for the purpose of Commission review. Thus, ISIS 2000 cannot be a benchmark for equivalent service. As a matter of fact, law and policy, the benchmark for such service is as set forth in the State's Opposition (at page 10 and Attachment C).

ISIS 2000 also continues to assert that its bid was "$23 million less" than that of the winning bidder, ENA, for the same service. (ISIS Reply at Section III). This also is simply incorrect--legally and factually. After a separate price review by the Department, as noted above, the Department concluded that the ISIS 2000 bid was "incompetent and confusing" (State Opposition, Attachment B) and that ISIS 2000 had continually refused to clarify its cost proposal (even upon written request), and even at the Review Committee level (State Opposition at Attachment C). At the Review Committee, the State estimated the "hidden costs" of the ISIS 2000 proposal at $187 million, or $113 million more than the ENA proposal. (State Opposition at page 10 and Attachment C). The ISIS 2000 silence must be viewed as an admission that ISIS 2000 was engaged in either an attempt to obfuscate a greater price disparity or an acceptance of this estimate. In either event, the ISIS 2000 bid was the most expensive, by approximately $113 million, to achieve the minimum capability determined by the State to be required (State Opposition at Section II). Moreover, the ISIS 2000 bid represented the highest pre-discount price, and the winning bid became the lowest pre-discount price.[4] This recognition of ENA as having the lowest pre-discount price is without regard to any USF funding!! With USF funding, ISIS 2000 remained the most expensive to the State, because ISIS 2000 did not conform its proposal to achieve available USF eligibility and because a significant amount of funding would be needed in the out-years for hidden costs, when no funding might be available and when ISIS 2000 would not perform without funding. On the other hand, ENA, the winning bidder, properly maximized both its eligibility potential and its flexibility for USF funding, thus retaining its designation of "most cost-effective", regardless of funding levels. The State law and the Commission's Rules do not require the rejection of a winning bid based on (i) its anticipated funding eligibility or (ii) its greater flexibility to account for funding variations. (Tenn Code Ann. § 12-4-109) (47 CFR § 54.101). Indeed, Congressional intent and the Commission's Rules encourage parties to structure their networks to maximize the benefits of commercial competition and, inevitably, to achieve lower costs, greater permissible funding and thus greater school access.

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[4] ISIS 2000 itself recognizes that the State's Independent evaluators rated ENA "superior" in every significant category, including cost: cost - forty-seven percent better (30 points vs 21 points); technology - forty percent better (35 vs 26) and overall -- thirty percent better (67 vs 87). (See ISIS Reply at page 25) (See Also State Opposition at Attachment C).

The State, in an attempt to clarify ISIS costs, went to the extraordinary step of attempting to confirm the costs of the ISIS 2000 subcontractor, BellSouth, however BellSouth could not even confirm its own costs because "it did not have all the information available before it bid". The Rampart Report acts to support the State's conclusions, however, noting at least $40 million in capital costs and $20 million in BellSouth costs, thus exceeding the ISIS 2000 bid by more than $9 million (Rampart Report at page 16) (BellSouth letter at page 2). This is another example of using almost any number that is convenient to confuse the decisionmaking process of the State and the Commission and to support false conclusions; without including any installation, monitoring or management.

This would be similar to structuring investments to reduce unnecessary taxes and to achieve tax credits, credits designed to encourage charitable giving, for example.

ISIS 2000 next argues that, because the State identified a State funding "cap", the "real" competition was for USF funding, not a lower pre-discount price. (ISIS Reply at Section I). This is simply incorrect and a factual and legal error! The record in the State and in this proceeding clearly shows that the consideration to ENA was based on its "lower pre-discount price "for the required service". Only then was USF funding considered. Indeed, nowhere is this more evident than in the fact that ENA was awarded the contract regardless of USF funding. It is also significant to note that it was ISIS 2000 (not ENA) which made its proposal contingent on full USF funding (State Opposition at Attachment B). (The Commission's Rules themselves caution against accepting such a proposal, with its attendant risks) (Fourth Report and Order at para. 221). Thus, without full USF funding for 3.5 years, ISIS 2000 would have ceased to perform (or would have invoiced the State for cost-overruns, over and above authorized state funding levels), as anticipated in State hearings. In brief, the State's award was made in full compliance with its competitive State procurement rules (see Tenn. Code Annotated § 12-4-109) (Attachment 1 hereto), after extensive internal evaluations, and after full administrative reviews.

Finally, in its consideration of the ISIS position, the State asks the Commission to take "official notice" of its Program costs and Program service options, as may relate to other Applicants. The USF cost of the Tennessee Program is guaranteed less than $17 per student per year. By any comparison the State has been able to measure for this level of service, Tennessee's approach has produced a per-student cost better than any other in the Country.

This is not simply to achieve "an initial level of connection capability" (as proposed by ISIS 2000) (see Rampart Report at 7) for subsequent upgrades and modifications, but rather for a guaranteed three (3) hours of access per student per week at a guaranteed delivery rate of two (2) web pages per minute for up to 90,000 computers. This type of Internet access was achieved through a well-developed Technology Plan for all schools and represents a total cost of twenty-three cents ($.23) per hour of student use. This productivity is critical to Tennessee rural schools and to the effective use of the Internet as a learning tool. No other ISP offers this type of equity of access to all schools, particularly rural schools!

III.

INTERNET ACCESS SERVICES ARE SPECIFICALLY ELIGIBLE FOR FUNDING UNDER THE COMMISSION'S RULES, AND THE STATE'S INTERNET SERVICE IS THE STANDARD IN THE INDUSTRY. THUS, IT IS ELIGIBLE FOR FUNDING.

ISIS 2000 asserts that the ENA Internet Access Service is not an internet service at all and, therefore, it is ineligible for funding. (ISIS 2000 Reply at Section II). ISIS provides not a single supporting example or definition to support its position, and it's theoretical assertions and comparisons in this regard are simply incorrect and in legal and factual error.

First, the Tennessee Schools will utilize the ENA service solely and exclusively for Internet access; there are no "broadbased telecommunications," voice or data, or internal LAN services offered or received! (See State Opposition at Section II and at Attachment C (RFP)). (See also ENA Contract, Attachment C). Second, the ENA service is specifically offered and used as defined in the Commission's Rules (47 CFR § 54.101); in the SLC's Clarifications (FAQs No. 5 and 8 dated July 2, 1997); and in Congressional implementation

(Fourth Report and Order at para. 190). (See FCC Report to The Congress at paragraphs 63-79). Third, the ENA service is identical to that Internet service offered to businesses by UUNET, Worldcom, AT&T and BellSouth (See Broadwatch Directory of Internet Service Providers (Fall 1996).[5] Indeed, it is similar to the Internet services "encouraged by the FCC to be offered" by cable television operators, like Intermedia and TCI with in-home connections (See In Re Continental Cablevision at 10 FCC Rcd 299 (1995). Fourth, ISIS 2000 itself alternately recognizes that this is a typical Internet Service by describing ENA as a "Tier 4 Internet Backbone provider" (ISIS 2000 Reply at page 14). Fifth, and finally, the fact that ISIS 2000 elected not to provide an Internet service but rather to be a simple equipment "aggregator" (ISIS Opposition at page 7, ftn 4) (March 10, 1998) and network manager, does not detract from the eligibility of the ENA Internet Service.[6]

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[5] It should be noted that ENA subcontractors include BellSouth, NCR, and ISDN.net, among others. Therefore, the suggestion by ISIS 2000 that ENA is unqualified and without Internet inexperience also is unwarranted. Also, Lucent Technologies was selected by ENA to replace ISIS 2000 in its proposal, as a subcontractor (based on its expertise in Internet) on "Help Desk" and associated technology engineering matters (See, however, ISIS 2000 Supp. 2 at page 4).

It is important to recognize that no internal connections are included, contrary to ISIS 2000's suggestion in its GAO Letter (at page 2). Furthermore, no Internet service connection in the school provides connections to the classrooms: Internet routers in the schools are solely for Internet terminations and are dependent entirely on a Local Area Network ("LAN") in each Tennessee school for internal connections. (See Fourth Report and Order at paras 451-458).

[6] The basis for the commercial decision to propose only a simple maintenance and integration service, contrary to ISIS 2000 assertions, is unrelated to USF funding, but rather is evident from the Rampart Report's recommendation that "as financial advisors we would feel more comfortable financing the ISIS 2000 proposal" as structured (than the ENA proposal) because "the Department would own the network" with its attendant capital risk. (Rampart Report, Attachment Q, at page 6).

While the State can only speculate, because no specificity is provided by ISIS 2000, ISIS 2000 seems to believe that dedicated access to a school (or business) and dedicated point-of-presence ("POP") equipment at a school (or business) renders an Internet service ineligible, thus rendering only "dial up" services eligible. In order to achieve the Internet economies now available only to businesses, dedicated access and a POP connection are needed to reduce the cost of Internet to Tennessee Schools by over 500 percent. (State dial-up estimates were 5X the cost of dedicated access). Furthermore, most Internet Service Providers (e.g. BellSouth.Net) provide a POP at the site of any entity with more than ten (10) computers, since the typical business customer does not have the in-house capacity to operate without it. If dedicated access and co-location is rejected, as ISIS 2000 requests, the ramifications are increased costs to all schools, and to the USF.[7] Further, if construction of new dedicated access for schools is rejected, as ISIS 2000 also requests, the rural and impoverished areas most in need of Internet service (because none may now exist) will be most harmed. This is clearly contrary to the legislation and rules which seek to empower and provide equity for such rural schools. The State submits that dedicated Internet access is a critical feature of many of the 30,000 Applications now under funding review.

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[7] As noted above, ISIS 2000 proposed a cost-plus-fee maintenance-only service for State-owned and purchased equipment. (Supplement 2 at page 11). Thus, the ISIS 2000 proposal has an incentive to be bandwidth "hungry", requiring more and more bandwidth to overcome system inefficiencies. Increased bandwidth increases USF funding on an annual basis. In this regard, the Rampart Report equates the ISIS 2000 responsibility to that of a "mechanic" or "portfolio manager" (Report at 23). A mechanic will assume responsibility for your car repair, but will not guarantee it or pay for it. A Portfolio Manager will assume investment responsibility for your money, but will not guarantee you a return or pay for your loses. This example represents one of the major differences with the ISIS 2000 and ENA proposals.

IV.

IN ORDER TO ENCOURAGE INTERNET TO THE SCHOOLS, BOTH THE STATE PUBLIC UTILITY AND THE USF PERMIT DISCOUNTS. THE INTRASTATE DISCOUNT DOES NOT ELIMINATE USF ELIGIBILITY.

ISIS 2000 argues that ENA is not eligible for USF funding because the State's TRA has a Special ISDN rate for schools and residential customers. (ISIS 2000 Reply at page 3). ISIS 2000 is simply incorrect and in factual error again!! ISDN circuits are obtained on a current-year basis by ENA under Special ISDN Rate tariffs established by the TRA. The Commission's Rules clearly and specifically address Special Rates and do not render them ineligible for funding (47 CFR § 54.281) (See also <u>Fourth Report and Order</u> at 194). Further, in the interests of providing greater clarification, the Tennessee Regulatory Authority has reviewed the ISIS 2000 situation and has released an Interim Order, affirming the Department's view. A copy of this Interim Order is included herewith as Attachment A.

V.

THE STATE'S DECISION TO TRANSITION FROM A STATE-OWNED NETWORK TO A FULL-SERVICE INTERNET ACCESS PROVIDER IS WITHIN THE STATE'S SCOPE OF AUTHORITY, IS EMINENTLY REASONABLE, AND IS FULLY SUPPORTED BY THE RECORD.

ISIS 2000 asserts that the decision to sell the network, and to move to an Internet Service Provider, has "no economic purpose" except to increase USF funding, and therefore, the Commission's Rules require that the State keep the School's Information System Network

("ConnecTen" or "Network"). (ISIS Reply at Section II) (see also Rampart Report at page 7). This is simply incorrect and factually and legally in error! The decision to dispose of the network, and to obtain an Internet Access Service, was found by the State to be based on solid technical and operational reasons, and on its clear and convening advantages to the children of Tennessee. The record in the State and in this matter is replete with support (see Opposition at Sections IV and V). The Rampart Report, among its other errors, fails to give any direct cost assignment to such matters as risks of hidden costs, technical obsolescence, parts replacement, and system expansion (see also footnote 6 above).

In any event, this decision to move to a full-service provider is not one to be left to an unsuccessful bidder; rather, it is one reserved to the State by the Commission's Rules. (See Fourth Report and Order). The move to a full service Internet Service is one primarily mandated by the rural nature of over sixty percent of the State's schools, the need to insure an end-to-end responsibility of service and a quality guarantee for the total network, and the current unavailability of alternate access facilities and service personnel in these areas. In brief, the ENA service was designed for, and meets the requirements of the Tennessee educational community. The ISIS 2000 approach, on the other hand, "appears to have been designed for the Department of Defense, to connect military bases", and not for schools, the Department believes. It assumes a readily available reserve talent pool of knowledgeable users and technically proficient servicers, and a massive infrastructure reserve. It also assumes no school-unique services (like pornography-blocking and in-classroom activation) and relies exclusively on supplemental assistance, bandwidth upgrades, and remote dial-in phone service by teachers who must leave their classes to initiate and to terminate service.

The School's decision to sell their Network as they have moved from 1,800 to 90,000 computers was based primarily on need and pre-discount cost, not on USF funding. To anyone familiar with education and changing technology, the State's decision is eminently reasonable -- if not required.

The State's decision to sell the ConnecTen Network to ENA was also based on the fact that all other transition alternatives would have increased State and USF funding. First, ENA could have acquired "new" software and hardware (rather than to purchase and use the "used" Network hardware and software). However, this would have entailed a higher pre-discount price of $12 million (versus $7.5 million for ConnecTen). The USF reimbursement for this alternative would have been $8 million ($3 million more than for the purchase of ConnecTen). (Opposition at page 13). Second, as a transition to ENA, the Schools could have simply "leased" internet capacity from BellSouth for the transition period. Based on the published rates for comparable throughput to the ENA contract, with appropriate discounts, the alternate would have been $81 million (ISIS Opposition at page 10). The USF reimbursement for this scenario would have been almost $54 million: more than seven times (7x) the current Program. (ISIS Reply to Opposition at page 10). Third, the State could have retained the ConnecTen Network and operated it and maintained it as a second network until the ENA Service was operational. This "interim" step would have required the State and the USF to fund two networks during the eighteen month (18 mos.) transition, at a prediscount price of an additional $7.5 million. This alternative would have increased USF funding by $5 million. In brief, the State selected the ENA transition alternative which reduced USF funding realistically by between $3 million and $54 million. The State could not keep the network and obtain an integrated, guaranteed service on July 1, 1998. The continuation of an inferior, unacceptable piece-meal service (as proposed by ISIS 2000) would have cost $187 million (see para. 3 above). The ISIS 2000 alternative would force the State and the schools either to pay excessive unknown charges for a "mixed-component" network with a maintenance-management contract, or to buy all "new" network equipment and software, or not to transition at all to a guaranteed service. While the State clearly could have committed to entirely "new" network equipment, and obtained USF funding, it did not believe this prudent, within the spirit of the Rules, or in the best interest of all schools seeking access to limited USF funding.

ISIS 2000 attempts to find support for its more costly transition proposal by characterizing the sale of the network as either a "wash" transaction, or as "not a transfer of ownership" at all. (ISIS Reply at Section 4). This is incorrect and a legal and factual error! ISIS 2000 supports its contention that there was no transfer of ownership of the ConnecTen Information Systems Network by providing the Commission with evidence of only a single part of a much more complex transaction under the State's comprehensive competitive procurement rules. These rules were carefully adhered to and applied, as required by Commission Rules. (See page 5 above). Enclosed as Attachment 3 hereto is a copy of the official sale letter signed by the Commissioner of Finance and Administration, the Comptroller of the Treasury and the Commissioner of Education. This document officially transfers the ConnecTen Network to ENA, based on the unanimous decision of the State's Information Systems Council approving "the sale to the Contractor of the State's interest in the ConnecTen project for $7.5 million". Thus, this is not a right-to-use, contrary to ISIS 2000 intimations.

The ISIS 2000 position also attempts to capitalize on the fact that the State did not sell or transfer all elements of hardware (retained elements valued by ISIS at $295,000). All elements were not required to be transferred, and the State transferred all elements required to insure a complete transition to an end-to-end Internet Access Service, with a guaranteed level of service to each and every school.[8] The State did not simply transfer equipment to ENA to get USF funding. If it had this in mind, it could have transferred more components than it did. Indeed, State competitive Procurement Rules, and reviewing State officers, would not have permitted a simple "wash" transaction with no purpose, except USF funding. (See Attachment A hereto). Components retained were not included for USF funding and no use payments for retained equipment are made to the State by ENA which are reflected in the State's USF Service contribution for USF funding purposes! This further reduces USF funding.

Finally, ISIS 2000 seems to believe that the State should not even be allowed to use the proceeds from the sale of the "used" ConnecTen network for the benefit of the Schools. In this regard, it states that the $7.5 million payment to the State resulting from the sale results in an "unjustified" $23 million of USF Funding, at 66 percent. (ISIS Reply at page

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[8] As an example, if a router was proposed for ultimate replacement by the Internet Access Provider, the existing "used" router was retained by the Schools, since any failure would result in a new ENA replacement; simply just earlier than expected. On the other hand, major software which required ongoing integration, upgrading, maintenance and operations over the term was "sold" to insure one-stop responsibility and end-to-end integrity of service.

3). As previously noted, the State, in a move to transition to an Internet Access Service envisioned by the USF Rules, sold its network through a competitive process in full compliance with State procurement rules. (Opposition at Section IV). The purchaser, ENA, has purchased the network at market value and below original cost (as well as below effective depreciated net book value). If the sale had been to anyone other than the winning bidder (or even if the State had sold an office building), there would be no question regarding the State's right to sell and to use its proceeds in any way it felt appropriate. The availability of ENA does not alter this State right. Indeed, in any event, the State legislature, as part of its 1998-1999 Budget Appropriation legislation, allocated $12.5 million from the General Treasury to the Schools' budget for this Program, including local contributions. Such legislation is a requirement for any funds that the State makes directly to the Schools. The fact that this state sold an interest in a network has no direct bearing on the State's Appropriation Process. (See Attachment 8 hereto for this allocation). ISIS 2000, therefore, would have the Commission reject State law.

Finally, it is important to recognize that the transition funding currently requested amounts to $3.2 million (not $23 million) (Application, lines 15 and 16) and that this is not, as ISIS 2000 argues, a direct reimbursement related to the sale. Rather, it is related to the full cost of Internet Access Service. ENA will be investing in excess of $7 million in the network within the first year to meet the School's requirements. The charge to the Schools relates to operations and maintenance costs, new investment and expenses, i.e. cost of service. Thus, ISIS 2000 is effectively asking the Commission to deny any transition funding, regardless of need, compliance or rules, and regardless of the overall efficiencies otherwise built into the Program.

VI.

INTERNET ACCESS SERVICES ARE, BY THEIR VERY NATURE, PRIVATE COMMERCIAL SERVICES AND THEIR USE AND FUNDING WAS SPECIFICALLY DIRECTED BY COMMISSION RULES.

ISIS 2000's last attempt to resurrect its non-responsive State bid is directed at the Internet market, in general. In its simplest form, the argument is that the State should own the network, not private commercial enterprises because they may profit ("overcharge") from the transaction (ISIS Reply at Section III)! This is simply contrary to the Telecommunications Act of 1996, the thrust of the statute adopting the USF, and the Commission's implementing regulations. It also fails to recognize that the State's schools should determine their needs within USF Guidelines, not ISIS 2000. It also underscores the basic premise of the ISIS 2000 proposal, a desire to "buy-in" at a low price and to profit by capitalizing, indirectly without risk, through future contract additions and change orders.

In this regard, ISIS 2000 argues that the award to ENA is a "guise to fund the construction of a privately-owned commercial network" valued at "$160 million". (ISIS Reply at Section IV). First, almost all, if not all Internet Service Providers are, by definition, privately-owned commercial wide area networks (see footnote 5, above). Indeed, the USF funding Rules are designed to encourage pre-discount price competition among such networks, as was done in the current case. Second, all such privately-owned commercial networks serving schools will, in effect, be funded in whole or in part with USF funds. Again, the attractiveness and availability of this funding was envisioned by Congress and by the USF funding rules to stimulate construction and use by schools. Third, and particularly appropriate in the case of rural states like Tennessee, the use of USF and State funds to construct facilities where none exist to lease, is the ideal and intended result--small and disadvantaged schools with access never before possible. Large urban areas and schools may always have access to existing ISPs, but small rural areas and schools do not. The ISIS 2000 approach (and novel interpretation of the Rules) would deny the fundamental underlying purpose of the USF Fund!

With respect to network value, ISIS 2000 and its consultant would have the Commission believe that the State, in order to obtain $23 million in USF Funding, would "give away" a network worth $160 million.[9] This, of course, would be contrary to State law and is simply incorrect. First, the State after careful review and over nine (9) hours of testimony (before representatives of the Commissioner of General Services, the Commissioner of Finance and Administration, the Commissioner of Education, and the Comptroller of the Treasury for the State, among others) (as required by TN Code 12-4-109) (attended by ISIS 2000) upheld the Department's determination that the ENA proposal was the "most efficient and cost effective". Further, upon a subsequent review by the State's Information Systems Council, attended by ISIS 2000, the State's Chief Information Officer determined that the "useful life cycle" of the system would be essentially ended after 3.5 years, resulting in little commercial value when compared to other evolving alternatives with their reduced costs. Finally, the Department concluded that the negotiated ability to terminate ENA after 60 days,

[9] It is interesting to note that the Rampart Report analysis, also found the state network utilized by ISIS 2000 (which ISIS 2000 describes as "substantially identical") to have a value of only $45 million, not $160 million. (Report at page 7).

and to commit future revenue to another new system, gives it extensive leverage in obtaining services and contracts in Tennessee.

In brief, the Department has reviewed the revenue and asset analyses projections of ISIS 2000's consultant and found them non-objective, unconvincing and self-serving, if for no other reason than without the schools there is no such uncommitted business revenue fund available in rural Tennessee. ISIS 2000's efforts (before the State, the Commission and through the press to ENA's Commercial Investors), thus, should be condemned. The Department has selected to obtain increased robust guaranteed services, among other things, rather than to trade them for future renewal options of questionable and declining value, for its dollars. It also found that the value of a network is based on its software and that there is little residual value in purchasing hardware for long-term use. The State believes that this decision is within its purview, and that it is best able to make such local decisions. (ISIS 2000 itself establishes the ConnecTen hardware at a value of only $295,000)

Finally, the commercial value of any network relates to its availability for commercial purposes. During the USF funding period, the schools will utilize the full capacity of the ENA network. Thus, there will be <u>no commercial service</u>. Further, all school connections will be <u>dedicated to the schools</u> and the schools will be the exclusive users. Any other use, of course, would require SLC and State approvals (and cost allocations) for ineligible users during the appropriate funding period.